(8) (6)

Nos. 85-1222 and 85-1267

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

STATE OF TEXAS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

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QUESTION PRESENTED

Whether the State of Texas may regulate, as motor carriage, the motor portion of intrastate trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) transportation provided by interstate rail carriers using their own trucks.*

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* This is a more concise statement of the questions presented in the petition for a writ of certiorari in No. 85-1222.

PARTIES TO THE PROCEEDINGS

The petitioner in No. 85-1222 is the Interstate Commerce Commission and the petitioners in No. 85-1267 are Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and Southern Pacific Transportation Company. Road-Rail Transportation Company, Inc., and the United States of America were also parties in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a)[1] is reported at 770 F.2d 452. The decisions of

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-1222. "J.A." refers to the joint appendix.

the Interstate Commerce Commission (Pet. App. 16a-23a, 24a-29a) are unreported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 8a-9a, 10a-11a) were entered on September 6, 1985. Petitions for rehearing en banc were denied on November 15, 1985 (Pet. App. 12a-13a). The petitions for a writ of certiorari were filed on January 21, 1986 (No. 85-1222) and January 24, 1986 (No. 85-1267) and were granted on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATUTES INVOLVED

Relevant provisions of the Interstate Commerce Act, as amended, 49 U.S.C. 10101a, 10501, 10505, 10521, and 11501, are set out at Pet. App. 30a-44a.

STATEMENT

A. The Statutory Background

After nearly a century of extensive federal regulation of railroads under the Interstate Commerce Act, ch. 104, 24 Stat. 379, 49 U.S.C. 10101 *et seq.* (1887), and efforts to improve and moderate that regulatory pattern,[2] Congress enacted the Staggers Rail Act

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[2] In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31 *et seq.* One of the features of the 4R Act was its authorization to the Commission to exempt services or transactions of "limited scope" where regulation was determined to impose an "undue burden" and to "serve little or no useful public purpose" (§ 207, 90 Stat. 42). Before making or revoking an exemption, the Commission was required to provide notice and an opportunity for a hearing to interested

of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895, 49 U.S.C. 10101 *et seq.* The premise of the Staggers Act was that the railroads' financial difficulties of the 1970s [3] and earlier were due in substantial part to two causes: disparate state and federal standards applying to the industry, see, *e.g.*, H.R. Rep. 96-1035, 96th Cong. 2d Sess. 61 (1980), and excessive governmental regulation at both the federal and state levels (see, *e.g.*, *id.* at 38, 128-130; H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 79 (1980); see generally *Illinois Commerce Comm'n* v. *ICC*, 749 F.2d 875, 877-878 (D.C. Cir. 1984), cert. denied, No. 84-1829 (Oct. 7, 1985)).

The Staggers Act sets forth a 15-element National Rail Transportation Policy, 49 U.S.C. 10101a. Among those elements are the following (49 U.S.C. 10101a):

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parties (*ibid.*). Also under the 4R Act, Congress gave the Commission authority to prescribe an intrastate rail rate upon application of a railroad if the state had not acted within 120 days of receiving a request by a railroad to change the rate (§ 210, 90 Stat. 46). Congress later determined that the 4R Act "ha[d] not provided the flexibility in rates that the industry need[ed] to earn revenues sufficient to maintain and improve the rail system" (H.R. Rep. 96-1035, 96th Cong., 2d Sess. 38 (1980)).

[3] In addition to the bankruptcies of eleven major railroads, including Penn Central (see H.R. Rep. 96-1035, 96th Cong., 2d Sess. 99 (1980)), there were other pervasive signs of difficulty. By 1980, almost two thirds of all intercity freight was transported by methods other than rail. See 49 U.S.C. 10101a note; H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 79 (1980). Earnings of railroads were lower than those of any other mode of transportation and were not sufficient to provide funding of essential capital improvements. See 49 U.S.C. 10101a note; H.R. Conf. Rep. 96-1430, *supra*, at 79.

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system * * *;
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> * * * *
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
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> * * * *
>
> (9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle.

To achieve these elements of national policy, the Staggers Act changed the regulation of interstate railroads in two ways that together form the statutory foundation of this case.

First, the Staggers Act gives the Interstate Commerce Commission broad authority to exempt rail carriers, or specified transactions or classes of service, from regulation. 49 U.S.C. 10505; see H.R. Rep. 96-1035, *supra*, at 60. The Commission is directed to grant an exemption whenever it finds that further regulation is not necessary to carry out national policy or to protect shippers. 49 U.S.C. 10505(a) provides as follows:

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

In addition to this general exemption authority, the Staggers Act specifically provides (49 U.S.C. 10505 (f)) that "[t]he Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." In granting the Commission broad exemption authority, Congress specifically recognized that the Commission was the appropriate body to determine whether an exemption was warranted. As the Conference report indicated (H.R. Conf. Rep. 96-1430, *supra*, at 105):

> The policy underlying [the exemption] provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress.

Second, the Staggers Act severely circumscribed the power of the states to regulate "in*tra*state transportation provided by a[n interstate] rail carrier" (emphasis added) subject to the jurisdiction of the Commission.[4] 49 U.S.C. 11501 provides, inter alia, as follows:

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[4] The federal government's constitutional power to regulate intrastate transportation by interstate railroads is well estab-

(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a[n interstate] rail carrier * * * if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority * * *.

* * * * *

(4)(A) * * * Any State authority which is denied certification [by the Commission] or

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lished and is not at issue in this case. "The federal government has long regulated intrastate rail traffic on the theory that such traffic is part of an interstate rail network and can sufficiently affect interstate commerce to permit regulation under the commerce clause * * *." *Illinois Commerce Comm'n* v. *ICC*, 749 F.2d at 877 (citing *Houston & Tex. R.R.* v. *United States (Shreveport Rate Case)*, 234 U.S. 342, 350-353 (1914)).

> which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices * * *.
>
> (B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
>
> * * * * *
>
> (c) Any rail carrier providing transportation subject to the jurisdiction of the Commission * * * may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. * * * If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

In summary, a state authority may exercise jurisdiction over "intrastate transportation provided by [an interstate] rail carrier"[5] only in accordance with the Interstate Commerce Act and the Staggers Act (Paragraph (b)(1)). A state authority is re-

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[5] This phrase "an interstate rail carrier" is a shorthand phrase for "a rail carrier providing transportation subject to the jurisdiction of the Commission [under 49 U.S.C. 10501 (a)]" (49 U.S.C. 11501(b)(1)).

quired to submit its standards and procedures to the Commission in order to obtain certification (Paragraph (b)(2)), and it may not regulate intrastate transportation provided by an interstate rail carrier at all if it is denied certification by the Commission (Paragraph (4)(A)). It is permitted to regulate intrastate transportation provided by an interstate rail carrier if it has submitted its standards and procedures to the Commission and the Commission, having first determined that "such [state] standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission,"[6] has certified the state authority (Paragraphs (3)(A) and (4)(A)). Even after certification, however, the Commission may review, upon petition by a carrier, the determination of a state authority in any state administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, to ascertain whether the standards and procedures applied by the state are in accordance with federal law (Subsection (c)). The Commission is itself directed to determine the appropriate rate, classification, rule, or practice if it determines that such standards and procedures are not in accordance with federal law (*ibid.*). Finally, the Staggers Act provides that intrastate transportation provided by a rail carrier in any state that has not been certified "shall be deemed to be transportation subject to the jurisdiction of the

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[6] Several courts of appeals have held that the phrase "standards and procedures" refers not only to statutory provisions but also includes standards and procedures set forth in regulations, rulings, and decisions of the Commission. See *Railroad Comm'n of Texas* v. *United States*, 765 F.2d 221, 232 (D.C. Cir. 1985), and the cases cited therein.

Commission" (49 U.S.C. 11501(b)(4)(B); see generally *Aluminum Co. of America* v. *United States*, 790 F.2d 938, 939 (D.C. Cir. 1986); 49 U.S.C. 10501 (c) and (d)).

The Staggers Act thus implements a major shift from state to federal regulatory control over intrastate transportation of interstate rail carriers. As the Fifth Circuit has stated, "the [Staggers] Act is in nature a preemptive statute. If a state wishes to continue regulating, it must do so in accordance with federal policy." *Texas* v. *United States*, 730 F.2d 339, 347 (5th Cir.), cert. denied, 469 U.S. 892 (1984). See also *Illinois Commerce Comm'n* v. *ICC*, 749 F.2d at 878; *Utah Power & Light Co.* v. *ICC*, 747 F.2d 721, 736 n.19 (D.C. Cir. 1984), on reh'g, 764 F.2d 865 (D.C. Cir. 1985); H.R. Conf. Rep. 96-1430, *supra*, at 83 ("State authority over intrastate [rail] transportation is limited to administering the provisions of the Interstate Commerce Act.").

B. The Plan II TOFC/COFC Exemption

In 1981, in its first action pursuant to its new exemption authority, the Commission adopted a new regulation (49 C.F.R. 1039.13) exempting what for convenience may be referred to as "Plan II" trailer-on-flatcar (TOFC) and contained-on-flatcar (COFC) service.[7] See *Improvement of TOFC/COFC Regula-*

[7] TOFC/COFC traffic, also known as "piggybacking," involves the transportation of trailers or containers on flatcars between points connected by rails; the goods are carried over the road, from or to points not connected by rail, in the same trailers or containers, and hauled (in "Plan II" service) by the railroad itself. When goods are to be delivered from or to a place not accessible by rail, TOFC/COFC eliminates the need to transfer the goods between rail car and truck. TOFC/COFC service provides flexibility for railroads by enabling them to serve areas beyond their tracks. See generally

tion, 364 I.C.C. 731 (1981); see also 364 I.C.C. 391 (1980) (notice of proposed TOFC/COFC exemption). The Commission described the exempted class of service more particularly as "railroad operations involving TOFC and COFC * * * conducted on railroad flatcars or in trucks that are owned and operated by the railroad itself (rather than by a separately incorporated railroad affiliate)." 364 I.C.C. at 733. By its terms, the Commission's exemption of Plan II TOFC and COFC service applies to both the rail portion and the motor portion of the service (*ibid.*; 49 C.F.R. 1039.13).[8]

D. Harper, *Transportation in America: Users, Carriers, Government* 541-543 (1978); R. Lieb, *Transportation: The Domestic System* 41 (2d ed. 1981).

The term "Plan II" service was used by the Commission in *Ex Parte 230, Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 305 (1964). In that proceeding, the Commission identified five distinct forms of TOFC/COFC Service (*id.* at 304-305, 309-312). Plan II service was described as follows (*id.* at 305):

> Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

In *American Trucking Ass'ns* v. *Atchison, T. & S.F. R.R.*, 387 U.S. 397 (1967), this Court affirmed the Commission's rule, adopted in *Ex Parte 230*, that railroads offering TOFC service must make that service available to motor and water carriers at the same rate as to the public. The Court in *American Trucking* also described the five TOFC/COFC plans set forth in *Ex Parte 230* (387 U.S. at 403, quoting 322 I.C.C. at 304-305). See pages 29-30, *infra*.

[8] The exemption also governs the *rail* portion of other TOFC plans where the rail carrier provides the rail service but a separate carrier, such as a trucking company, provides the other portion of the service. See 364 I.C.C. at 733-734; 49 C.F.R. 1039.13.

The Commission based its TOFC/COFC exemption both on its general exemption power under the Staggers Act (49 U.S.C. 10505(a)) and on 49 U.S.C. 10505(f), which authorizes the Commission to exempt "transportation that is provided by a rail carrier as a part of a continuous intermodal movement." In promulgating the exemption, the Commission found, pursuant to 49 U.S.C. 10505(a)(2)(B), that "the potential for railroad abuses of market power in TOFC/COFC service is virtually nonexistent" (364 I.C.C. at 393). It further concluded (*id.* at 395) that as a result of the exemption, "[r]ailroads will be able to offer a complete intermodal service without regulatory restraints."

The Commission's exemption of Plan II TOFC/COFC service was challenged in the Fifth Circuit on the ground, inter alia, that the Commission's exemption authority did not extend to motor carriage but applied only to rail carriage. The Fifth Circuit upheld the Commission's TOFC exemption in all relevant respects. *American Trucking Ass'ns* v. *ICC (ATA)*, 656 F.2d 1115 (1981). In particular, the court rejected the contention that the Commission's exemption authority did not reach the over-the-road portion of TOFC/COFC service. In the court's words (656 F.2d at 1120 (citation and footnote omitted)):

> [R]ail-owned truck TOFC/COFC service is "transportation that is provided by a rail carrier." Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language and presumably did so with knowledge

> that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle.

The court stressed the fact that under the TOFC/COFC service at issue, the railroads were providing and operating their own trucks (*id.* at 1121).

C. The Present Dispute

After the enactment of the Staggers Act, Texas, along with most other states, applied to the ICC for certification to regulate intrastate rail transportation, and from April 17, 1981, until May 20, 1984, the Railroad Commission of Texas (RCT) operated under a provisional certification.[9] During the period of

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[9] Under the Staggers Act, as noted above (pages 6-9), states seeking to continue playing a regulatory role with respect to intrastate transportation provided by an interstate rail carrier were required to submit their standards and procedures to the Commission within 120 days of the enactment of the Act. 49 U.S.C. 11501(b)(2). The Commission was directed by Congress to deny certification to states whose standards and procedures did not comply with federal law. As of January 1981, 40 states, including Texas, had applied for certification. See *Ex Parte No. 388, State Intrastate Rail Rate Authority—Pub. L. 96-448*, 364 I.C.C. 881, 882, 885 (1981). The Commission found (*id.* at 882), however, that the states' applications were incomplete. Instead of denying certification, the Commission, on April 17, 1981, gave each of the 40 states provisional certification. See generally *Railroad Comm'n of Texas* v. *United States*, 765 F.2d 221, 224-226 (D.C. Cir. 1985). The states were therefore permitted to continue regulating intrastate transportation provided by an interstate rail carrier, pursuant to federal standards (and subject to the Commission's authority (49 U.S.C. 11501(c)) to review and set aside state actions not in accordance with federal law). The Commission's decision granting states conditional

Texas' provisional certification under Section 11501 (b) to regulate intrastate rail service, some forty decisions by RCT rejecting contracts between railroads and shippers were appealed to, and reversed by, the Commission. See *Railroad Comm'n of Texas* v. *United States*, 765 F.2d 221, 224-225 & n.1 (D.C. Cir. 1985) (citing examples). In many of its rulings, the Commission warned RCT that it was not complying with federal standards. See *id.* at 225.

In April 1984, the Commission reviewed Texas' final submission. The Commission ruled that Texas did not qualify for final certification and terminated its provisional certification as well. *State Intrastate Rail Authority—Texas*, 1 I.C.C.2d 26 (1984). That decision by the Commission, which became effective on May 20, 1984 (see 49 Fed. Reg. 17106), was upheld by the District of Columbia Circuit, *Railroad Comm'n of Texas* v. *United States*, *supra*, and Texas did not seek review of that decision in this Court. Accordingly, under 49 U.S.C. 11501(b)(4)(A) and (B), Texas may not now exercise any jurisdiction over intrastate rates, classifications, rules and practices of railroads subject to the jurisdiction of the Commission.

During the period in which it was operating under provisional certification, RCT issued the two orders involved in the present case (J.A. 22-23, 35-36). In both orders RCT exempted the rail portion of in-

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certification was upheld in *Illinois Central Gulf R.R.* v. *ICC*, 720 F.2d 958 (7th Cir. 1983). Revised certification requests were filed by 36 states, including Texas. These new submissions were still deemed inadequate, however, and the Commission, in January 1982, extended those states' provisional certification. See *id.* at 959.

trastate TOFC/COFC service from regulation but refused to exempt the motor portion of that same service (J.A. 23, 36).

The first RCT order involved petitioner Missouri-Kansas-Texas Railroad Co. (MKT), which had applied to RCT for exemption from regulation of its intrastate TOFC/COFC traffic to the same extent that the Commission's 1981 regulation had exempted Plan II TOFC/COFC traffic. An RCT hearing examiner issued a proposed decision in the MKT case on October 19, 1983 (J.A. 11-21).[10] On December 5, 1983, RCT issued an order adopting the hearing examiner's recommendation (J.A. 22-23). Under RCT's ruling, the rail portion of MKT's intrastate TOFC/COFC operations was exempted, but its "incidental pre-rail and ex-rail over-the-road movements" were not exempted (J.A. 23).

MKT and various intervenor rail carriers appealed RCT's decision to the Commission, pursuant to 49 U.S.C. 11501(c), contending that RCT's refusal to extend the intrastate exemption to cover the motor portion of TOFC/COFC service, in trucks owned and operated by the railroads as part of a continuous intermodal movement, was contrary to federal standards. The Commission agreed with MKT. In a decision rendered in January 1984 (Pet. App. 16a-23a), the Commission ruled that its 1981 TOFC/COFC regulation had exempted not only the rail por-

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[10] The evidence at the hearing revealed that MKT averaged about 92 TOFC/COFC shipments per month within Texas intrastate commerce and planned to double that traffic within three years if RCT granted an exemption (J.A. 14). Various rail carriers that had intervened in MKT's proceeding also planned to engage in Texas intrastate TOFC/COFC activity if the exemption were granted (*ibid.*).

tion but also the motor portion of TOFC/COFC service, where the motor portion is provided by interstate rail carriers in their own trucks, and directed RCT (under 49 U.S.C. 11501(c)) to exempt the motor portion as well.

The second RCT order involved in this case dealt with Road-Rail Transportation Company, Inc. (Road-Rail), which had applied to RCT for exemption from regulation for its "roadrailer" equipment.[11] On January 17, 1984, an RCT hearing examiner issued a proposed ruling (J.A. 24-34) recommending that Road-Rail's application be granted as to rail movement but denied as to highway movement (J.A. 32, 34). Notwithstanding the Commission's intervening decision in January 1984 in the MKT case (Pet. App. 16a-23a), RCT, on February 28, 1984, adopted the hearing examiner's recommendation (J.A. 35-36). Road-Rail appealed to the Commission pursuant to 49 U.S.C. 11501(c); the Commission reversed, stating (Pet. App. 27a-28a (footnote omitted)):

> In a decision served January 23, 1984, we determined that the entire TOFC/COFC exemption is in effect in the State of Texas * * *. Thus, the failure of RCT to recognize an exemption for all of Road-Rail's intermodal rail and highway operations within Texas is a clear violation of Federal standards.
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> * * * * *
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> Under 49 U.S.C. 11501(c), we find that the RCT's refusal to accord Road-Rail the benefits of the entire exemption approved by us in TOFC/COFC violated Federal standards and

[11] Roadrailers are "specially designed carriage vehicles which will operate in a rail mode or a highway mode" (J.A. 26).

procedures binding upon RCT in its regulation of intrastate commerce.[12]

The State of Texas sought review of the Commission's decisions in the MKT and Road-Rail cases in the Fifth Circuit.[13] The Fifth Circuit reversed the Commission in both cases. The court's decision was based (Pet. App. 4a) primarily on 49 U.S.C. 10521 (b)(1), a provision of the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, as amended, 49 U.S.C. 10101 *et seq.* (the Motor Carrier Act), which provides, with certain exceptions not applicable here, that nothing in Subtitle IV of Title 49 (which codifies the Interstate Commerce Act, the Motor Carrier Act, the Staggers Act and other laws) "affects the power of a State to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. 10521 (b)(1). The court stated that 49 U.S.C. 10521(b)(1) contains no exception for "intrastate trucking by intrastate rail carriers in an intermodal setting" (Pet. App. 7a). Apparently assuming that rail carriers become "motor carriers" for the motor portion of

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[12] The Commission did not comment directly upon the various specific types of services that Road-Rail proposed to perform in Texas (see J.A. 26 (describing proposed services)), since the only issue before it was whether its 1981 exemption of Plan II TOFC/COFC service applied to intrastate transportation of interstate rail carriers. The Commission did note (Pet. App. 27a), however, that it had previously found Road-Rail to be a rail carrier subject to its jurisdiction.

Road-Rail is not a petitioner in this proceeding, and we are advised by counsel for Road-Rail that the company has been reorganized in bankruptcy and no longer performs rail carriage service but merely sells and leases its roadrailer equipment.

[13] The two cases were consolidated in the Fifth Circuit for purposes of argument (J.A. 3, 6).

Plan II TOFC/COFC service, the court concluded that the states retain exclusive jurisdiction over the motor portion of intrastate TOFC/COFC service (Pet. App. 5a, 7a). Without specifically discussing the fact that a prior Fifth Circuit panel had held in *ATA* that the phrase "transportation provided by a rail carrier" includes the motor portion of Plan II TOFC/COFC service (see pages 11-12, *supra*), the panel distinguished the *ATA* decision on the ground that both the rail and motor travel involved in *ATA* were interstate (Pet. App. 5a).

The court of appeals recognized that the Commission "has been given jurisdiction over intrastate rail traffic" (Pet. App. 6a) and that "[a] principal change occasioned by the Staggers Rail Act was the curtailment of the authority of the states to regulate that traffic" (*ibid.*). Nonetheless, the court stated that "to accept uncritically the I.C.C.'s argument that it can exempt intrastate trucking connected with intrastate rail travel from all regulation would be to court potential mischief" (*ibid.*). To exemplify what it deemed to be the "potential mischief" of the Commission's decision, the court gave the following hypothetical example (*id.* at 6a-7a):

> A small intrastate rail carrier could transport goods, in a trailer capable of TOFC movement, from the point of origination to its terminal, which might be close or at a distance. The trailer then could be loaded on a flatcar and moved by rail a few miles and thereafter continue its journey anywhere within the State of Texas, totally exempt from any motor carrier regulation. Extending the worst case scenario, one might envision a small intrastate railroad

> which operates many trucks. A trailer load is picked up by truck at Orange, Texas and transported hundreds of miles to the intrastate rail carrier's terminal on the eastern fringe of San Antonio. There the trailer is placed on a flatcar and transported across the city to a terminal on the western edge of that city. At that point, the trailer is removed from the flatcar, attached to a cab (perhaps the same one), and driven additional hundreds of miles across Texas highways to El Paso. That movement of goods would involve transportation by motor carrier across the entire State of Texas, except for the few miles across the city of San Antonio, but be completely free of regulation by state authorities.

The court concluded that "intrastate transportation by a motor carrier, even if done in conjunction with a measure of intrastate rail transportation in the TOFC/COFC intermodal setting, is subject to regulation by the states" (*id.* at 7a). A petition for rehearing en banc was subsequently denied (*id.* at 12a-13a).

SUMMARY OF ARGUMENT

This case presents two issues of statutory interpretation. The first is whether the motor portion of intrastate Plan II TOFC/COFC service (*i.e.*, TOFC/COFC service "conducted on railroad flatcars or in trucks that are owned and operated by the railroad itself") is "intrastate transportation provided by a rail carrier" within the meaning of the Staggers Act, 49 U.S.C. 11501, and hence subject to the jurisdiction of the Commission. The second is whether, even if so, the motor portion of such service is nevertheless "intrastate transportation provided by a motor carrier" within the meaning of the Motor Car-

rier Act, 49 U.S.C. 10521(b)(1), and hence subject to state regulation.

If, as we contend, the motor portion of Plan II TOFC/COFC service is "transportation provided by a rail carrier" and is *not* "transportation provided by a motor carrier," then the State of Texas is barred from regulating the motor portion for two separate reasons. First, in the proceeding under review, the Commission determined that the standards and procedures applied by the state in determining to regulate the motor portion were not in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission, which has determined to exempt all Plan II TOFC/COFC service, including the motor portion. See 49 U.S.C. 11501(c). Second, in a decision not now under review or subject to further review, the Commission denied Texas' request for certification under 49 U.S.C. 11501(b) to regulate intrastate transportation provided by rail carriers, on the ground that the standards and procedures submitted by Texas with that request were not in accordance with federal standards and procedures; as a result, Texas may not regulate *any* "intrastate transportation provided by a[n interstate] rail carrier."

The motor portion of Plan II TOFC/COFC service is "transportation provided by a rail carrier." The Fifth Circuit so ruled in *ATA* and did not question that conclusion in this case. Nor has any case held otherwise. The Fifth Circuit's *ATA* ruling rests on the fact that the over-the-road portion of the service in question is provided by the rail carrier using its own trucks; on the language of the statute, which defines "transportation" broadly to include over-the-road transport; and on Congress' decision not to use

a term such as "transport by rail" but instead to use the term "transportation provided by a rail carrier," thereby indicating its intention to include all such transportation.

The motor portion of Plan II TOFC/COFC service is not "transportation provided by a motor carrier" because, while it is "transportation," the railroad does not become a "motor carrier" merely by providing Plan II TOFC/COFC service. Again, the statute itself is dispositive: the term "motor carrier" is a defined term that does not include a carrier that offers motor transportation only as a part of Plan II TOFC/COFC service. The Fifth Circuit's assumption, stated without analysis or citation, that the railroad automatically becomes a "motor carrier" when it provides the motor portion of Plan II TOFC/COFC service, is erroneous.

The Commission's determination that the motor portion of Plan II TOFC/COFC service is "transportation provided by a rail carrier" and not "transportation provided by a motor carrier" is in accordance not only with the language of both the Staggers Act and the Motor Carrier Act but also with Congress' legislative objectives. Under the Fifth Circuit's ruling, if a railroad provides interstate TOFC/COFC service, with railroad-owned trucks providing ancillary pickup and delivery service by hauling the trailers/containers to and from rail points, (i) the railroad is exempt (by virtue of the Commission's 1981 regulation) from any federal or state economic regulation of any portion of the journey with respect to any shipment that crosses a state line, but (ii) with respect to any shipment (even if carried on the same train) that does not cross a state line, the railroad is exempt only with respect to the rail portion

of the transportation and not the motor portion. That result would frustrate Congress' effort in the Staggers Act to achieve reduced and more rational regulation of railroads in general and of intermodal transportation in particular.

ARGUMENT

THE COMMISSION HAS AUTHORITY TO REQUIRE THE STATES TO EXEMPT BOTH THE RAIL PORTION AND THE MOTOR PORTION OF INTRASTATE PLAN II TOFC/COFC SERVICE PROVIDED BY INTERSTATE RAIL CARRIERS

A. Under The Plain Language Of The Interstate Commerce Act, As Amended By The Staggers Act, The Motor Portion Of Plan II TOFC/COFC Service Is "Transportation Provided By A Rail Carrier"

The starting point for interpreting a statute is the language itself: "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984)).

The Staggers Act provisions that confer broad exemption authority on the Commission (49 U.S.C. 10505(a) and (f)) and narrowly circumscribe the power of states to regulate intrastate transportation provided by interstate rail carriers (49 U.S.C. 11501 (b) ,and (c)) repeatedly and consistently use the term "transportation provided by a rail carrier." *E.g.*, 49 U.S.C. 11501(b)(1); 49 U.S.C. 11501(b)(4)(B); 49 U.S.C. 10505(f). By using the broad term "transportation provided by a rail carrier" rather than, for example, "transport by rail," Con-

gress made clear that it intended to refer to all transportation provided by rail carriers subject to the Commission's jurisdiction, not merely to rail transportation. The applicable definition of "transportation" is contained in 49 U.S.C. 10102(25); that definition is not limited to rail movement but includes, inter alia, movement by motor vehicle.[14] Thus, by the terms of Sections 10505 and 11501, the Commission has authority not only over intrastate rail movements of an interstate rail carrier, but also over other forms of transportation, where such other forms of transportation are "provided by" the rail carrier.

In the general exemption provision of the Staggers Act, 49 U.S.C. 10505(a), the Commission's authority to exempt persons, transactions, or services from regulation extends to "matter[s] related to a[n interstate] rail carrier *providing transportation*" (49 U.S.C. 10505(a) (emphasis added)). And in 49 U.S.C. 10505(f), Congress again used broad language in explicitly recognizing that the Commission's exemption authority extends to intermodal transportation:

> The Commission may exercise its authority under this section to exempt *transportation that is pro-*

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[14] "Transportation" is defined to include (49 U.S.C. 10102(25)):

> (A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

> *vided by a rail carrier* as a part of a continuous intermodal movement. [Emphasis added.]

In *ATA*, the Fifth Circuit had before it a challenge to the Commission's 1981 regulation exempting, pursuant to Section 10505, both the rail portion and the motor portion of Plan II TOFC/COFC service. The challengers in that case alleged that the phrase "transportation provided by a rail carrier" encompassed only the rail portion and not the motor portion of such service. The court noted that, under the TOFC/COFC service in question, the railroads provided the motor portion themselves, using their own trucks. 656 F.2d at 1121. Finding the literal meaning of the statute controlling, the court ruled that the Commission's authority to exempt Plan II TOFC/COFC service from regulation under 49 U.S.C. 10505 extended not only to the rail portion but to the motor portion as well. The court's reasoning bears quoting at length (656 F.2d at 1120-1121 (footnote omitted) (emphasis added)):

> [R]ail-owned truck TOFC/COFC service is "transportation that is provided by a rail carrier." *Had Congress intended to limit the Commission's exemption authority to rail transportation, it could easily have done so by using that language. Instead, it chose the broad "transportation-that-is-provided-by-a-rail-carrier" language* and presumably did so with knowledge that it previously had defined "transportation" to include the movement of passengers or property by motor vehicle. 49 U.S.C. § 10102(24).
>
> More important, the source of the Commission's authority to grant exemptions is found in section 10505(a) and not in section 10505(f), which simply singles out continuous intermodal

> movement as an appropriate candidate for the exercise of the Commission's section 10505(a) exemption authority. Section 10505(a) authorizes the Commission to grant an exemption "[i]n a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter" when certain findings are made. *Again we note that Congress has chosen not to define narrowly the Commission's exemption authority but instead has extended that authority to "matter[s] related to a rail carrier providing transportation * * *." We find that transportation of TOFC/COFC traffic by rail-owned trucks is a "matter related to a rail carrier providing transportation" within the meaning of section 10505(a).*

The court further noted (656 F.2d at 1121 (footnote omitted)) that the challengers had failed to explain "what other, more narrowly circumscribed matters Congress could have had in mind when it enacted section 10505(a)." Accord, *Hansen* v. *Norfolk & W.R.R.*, 689 F.2d 707, 712 (7th Cir. 1982) (noting with approval the Commission's exemption of both the truck portion and the rail portion of railroad-provided TOFC service).[15]

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[15] The conclusion that Congress intended the phrase "transportation provided by a rail carrier" to be broader than "rail transportation" or "rail traffic" is evident in at least one pre-Staggers Act provision of the ICA, 49 U.S.C. 10523(a)(1)(B)(i). That section provides that the Commission has no jurisdiction under subchapter II (the motor carrier subchapter) "over transportation by motor vehicle provided in a terminal area when the transportation * * * is *provided by* * * * a rail carrier subject to the jurisdiction of the Commis-

In the present case, the Fifth Circuit had before it the question whether the phrase "intrastate transportation provided by a[n interstate] rail carrier"—which appears in Section 11501 where it defines the activity over which state authority is narrowly circumscribed—reaches only the rail portion of intrastate Plan II TOFC/COFC service or reaches both the rail and motor portions. Although the opinion is not perfectly clear on this point, the court does *not* seem to have departed from the logic of the prior Fifth Circuit decision in *ATA*.[16] To the contrary,

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sion * * *" (emphasis added). See also 49 U.S.C. 10523(a)(1)(B)(ii), (iii) (similar provision with respect to motor vehicle service in a terminal area "provided by" water carrier or freight forwarder). This use of the phrase "transportation * * * provided by * * * a rail carrier" in 49 U.S.C. 10523(a)(1)(B)(i) refers, by its terms, to "*motor* * * * transportation * * * provided by * * * a rail carrier" (emphasis added). Like the statutory provisions involved in the present case, 49 U.S.C. 10523(a)(1)(B)(i) demonstrates that when Congress is referring to some mode other than, or in addition to, rail transportation, it does so by using the phrase "transportation provided by a rail carrier."

[16] The court below twice misstated the Commission's jurisdiction over railroads. At one point, the court said that for the Commission to have jurisdiction "the *transportation* must originate in or traverse a sister state or foreign country" (Pet. App. 4a (emphasis added)). Later, the court described, as an example of the "mischief" supposedly possible as a result of the Commission's order, a "small *intrastate* rail carrier" (Pet. App. 6a (emphasis added)) gaining an exemption for motor carriage by having the goods "moved by rail a few miles." *Ibid.* Both statements are wrong. The Commission's jurisdiction over rail carriers extends to *carriers* providing interstate transportation (see 49 U.S.C. 10501) and the Staggers Act and the Commission's jurisdiction plainly reach intrastate transportation provided by such a carrier, 49 U.S.C. 11501, but they do not reach wholly intrastate carriers. The

the court appears to have assumed that the phrase "transportation provided by a rail carrier," which appears in both Section 11501 and Section 10505, means the same thing in both contexts and is broad enough in both contexts to cover the motor portion of Plan II TOFC/COFC service. That conclusion follows from the language of the statute and the Fifth Circuit's broader ruling in *ATA*; moreover, no court has held to the contrary.

B. The Motor Portion Of Plan II TOFC/COFC Service Is Not "Transportation Provided By A Motor Carrier"

The jurisdictional section of the Motor Carrier Act, 49 U.S.C. 10521(b)(1),[17] provides that, with certain exceptions not applicable here, subtitle IV of Title 49, which contains all the statutes at issue in this case, "does not * * * affect the power of a State to regulate intrastate transportation provided by a motor carrier." The court below appears to have concluded that although the motor portion of Plan II TOFC/COFC is "transportation provided by a rail carrier" within the meaning of 49 U.S.C. 11501, it is also "transportation provided by a motor carrier" within the meaning of 49 U.S.C. 10521(b)(1) and is therefore, if conducted intrastate, subject to state

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court's example of supposed "mischief" is discussed below at pages 35-36.

[17] The Motor Carrier Act of 1935 implemented federal regulation of motor carriers. In 1980, Congress passed the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, 49 U.S.C. 10101 *et seq.* That legislation provides, inter alia, for greater service and price competition among carriers, rate flexibility, and eased entry standards. In enacting the Motor Carrier Act of 1980, Congress sought to reduce unnecessary regulation in the motor carrier industry. See H.R. Rep. 96-1069, 96th Cong., 2d Sess. 3, 10 (1980).

regulation.[18] The court assumed that because the railroad petitioners in this case were providing motor service as part of their Plan II TOFC/COFC service, they automatically became "motor carriers" as to the motor segment of the journey. It then reasoned that, under 49 U.S.C. 10521(b)(1), the State of Texas retained jurisdiction over the motor portion of the intrastate Plan II TOFC/COFC transportation provided by the railroad petitioners (Pet. App. 4a, 7a). The court distinguished *ATA* on the ground that in *ATA*, the "rail travel" and "motor carrier travel" were both "interstate" (Pet. App. 5a).

The court below erred in ruling, on the basis of no legal authority, that the motor portion of Plan II TOFC/COFC service is "transportation provided by a motor carrier." The service is, of course, "transportation," but the rail carriers providing it do not become "motor carriers" by virtue of providing motor service as part of Plan II TOFC/COFC service. In the first place, the railroads do not fit the statutory definition of "motor carrier," the pertinent part of which contemplates a person offering the public motor service over one or more routes and being compensated for *that* carriage, not a railroad offering, on a single tariff, rail transportation supplemented by motor transportation provided by the railroad itself using its own trucks.[19] In the performance of Plan

[18] The court of appeals did not expressly consider (1) whether the same transportation can be both "provided by a rail carrier" and "provided by a motor carrier" or (2) how, in such a case, the conflict between the curtailment of state jurisdiction in Section 11501 and the broad preservation of state power in Section 10521 would be resolved.

[19] 49 U.S.C. 10102(12) provides that the term "motor carrier" "means a motor common carrier and a motor contract

II TOFC/COFC service, in which the rail carriers own and operate the trucks involved, the railroads

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carrier." "Motor common carrier" and "motor contract carrier" are defined as follows (49 U.S.C. 10102):

> (13) "motor common carrier" means a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both.
>
> (14) "motor contract carrier" means—
>
> (A) a person, other than a motor common carrier, providing motor vehicle transportation of passengers for compensation under continuing agreements with a person or a limited number of persons—
>
> (i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or
>
> (ii) designed to meet the distinct needs of each such person; and
>
> (B) a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons—
>
> (i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or
>
> (ii) designed to meet the distinct needs of each such person.

The court below did not cite the statutory definition of "motor carrier" but simply assumed that anyone who provides truck service is automatically a motor carrier. The activity exempted by the Commission's 1981 regulation and by the rulings in this case plainly does not bring a person within the definition of "motor contract carrier." Nor does it bring a person within definition of "motor common carrier"—a person engaging in Plan II TOFC/COFC service does not hold itself out as offering, and does not publish any tariff relating to, motor vehicle transportation over regular or irregular routes. Rather, it offers transportation by rail in which (as an inseparable part of a single tariff) the motor portion is included.

do not offer motor vehicle transportation as such over any route, and they therefore do not become motor carriers. As the Fifth Circuit recognized in *ATA* (656 F.2d at 1121): "[T]he transportation of TOFC/COFC traffic in trucks owned and operated by railroads is closely related to railroads providing rail transportation * * *."

It has been implicit in Commission regulatory decisions since at least 1964 that intermodal service may be "provided by a rail carrier" or "provided by a motor carrier" without a rail carrier becoming a motor carrier, or vice versa.[20] In *Ex Parte 230, Substituted Service-Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 304-305, 309-312 (1964), the Commission described five kinds of intermodal service. As later quoted by this Court in *American Trucking Ass'ns* v. *Atchison, T. & S.F. R.R.*, 387 U.S. 397, 403 (1967), the descriptions are as follows:

> Plan I (Joint Intermodal):
>
> Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs, and the railroad's compensation is arrived at by negotiation between the two carriers.

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[20] Even if the definition of "motor carrier" were ambiguous, the Commission's interpretation of the statute it is responsible for administering is entitled to judicial deference. See generally *United States* v. *Fulton*, No. 84-1725 (Apr. 7, 1986), slip op. 9; *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-845 (1984), see also *United States* v. *Drum*, 368 U.S. 370, 386 (1962) (recognizing that a court should not substitute its judgment for that of the Commission on the issue of whether someone is a "contract carrier" or a "private carrier").

Plan II (All-Rail):

Door-to-door service performed by the railroad, which moves its own trailers or containers on flatcars under open tariffs usually similar to those of truckers.

Plan III (All-Rail):

Ramp-to-ramp rates to private shippers and freight forwarders, based on a flat open-tariff charge, regardless of the contents of trailers or containers, which are usually owned or leased by freight forwarders or shippers. No pick-up or delivery is performed by the railroad.

Plan IV (All-Rail):

Flat open-tariff charge for loaded- or empty-car movement, the railroad furnishing only power and rails. Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased.

Plan V (Joint Intermodal):

Joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement, and traffic moves on originating carrier's bill of lading.

The Commission elaborated on the nature of Plan II service as follows (322 I.C.C. at 311):

> Under plan II, the railroad holds out to provide a complete door-to-door service under a single bill of lading. Neither the shipper nor the consignee intervenes in any way in the overall transportation activities or does anything beyond tendering the shipment to the railroad at origin or at the shipper's loading dock. The railroad assumes full responsibility in the following

> respects: providing the shipper with a trailer; moving the trailer to, and placing it at, the shipper's door for pickup; loading the freight into the trailer; moving the loaded trailer from the shipper's dock to the TOFC ramp, furnishing a tractor and driver; supplying the rail flatcar; placing and securing the trailer onto the flatcar; providing the line-haul transportation from origin ramp to destination ramp; unloading the trailer from the flatcar at destination; moving the loaded trailer from the destination ramp to consignee's store door, again furnishing a tractor and driver; unloading the freight from the trailer; and finally removing the empty trailer.

In describing which specific carrier is in fact "providing" the particular TOFC/COFC plan, the Commission explained (322 I.C.C. at 330 (emphasis added)):

> [A]ll three—rail carrier, motor carrier, and freight forwarder—are even today providing, through the use of piggyback, services which in physical characteristics are substantially similar. Any one of the three can offer a transportation service which includes door-to-door pickup and delivery, movement of loaded trailers between a shipper's premises and a rail yard, and line-haul transportation of the loaded trailers by rail. *The railroad does this under its plan II TOFC tariff*; the trucker does it under plan I, in which it is encouraged by the railroads. * * *.

The Commission has thus since 1964 recognized that Plan II TOFC/COFC service is a service that is provided by a railroad, in contrast to Plan I service provided by a trucker. There is no evidence that Congress has disagree with the Commission's characteri-

zation or sought to separate the two parts of Plan II TOFC/COFC service for any regulatory purpose.[21]

This Court's decision in *Thomson* v. *United States*, 321 U.S. 19 (1944), is not to the contrary. In *Thomson*, the Court held that a railroad had "grandfather" rights to a certificate as a common carrier by motor vehicle where the facts showed that it had "supplemented its rail freight service by providing motor vehicle service between various freight stations on its rail lines" (*id.* at 20). Those motor vehicle routes were described as "parallel with and roughly adjacent to the railroad's lines" (*ibid.*). The trucks were supplied, pursuant to a contractual arrangement, by motor vehicle operators (*id.* at 21).

The service provided by the railroad in *Thomson* differed from what the Commission much later defined as "Plan II TOFC/COFC service" in a critical respect: truck service was not a part of a single intermodal service provided by a railroad; rather, the truck routes were parallel to the rail routes, so

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[21] In enacting amendments to the Motor Carrier Act, Congress considered a provision that would have exempted "transportation by motor vehicle incidental to movement by rail, including transportation of property by motor vehicle for any distance as part of a continuous movement which, prior or subsequent thereto, has been or will be transported by rail, or occasional transportation of property by motor vehicle in lieu of transportation by rail because of mechanical failure, accident, or other causes beyond the control of the carrier or shipper." 126 Cong. Rec. 7771 (1980). See *ATA*, 656 F.2d at 1121. This pre-Staggers Act proposal—which covered far more than the motor portion of Plan II TOFC service—was not enacted. During the debates, the following argument was made against the proposal: "The incidental to rail portion of the bill * * * creates a situation of half-regulated, half-unregulated transportation * * *." 126 Cong. Rec. 7825 (1980) (remarks of Sen. Cannon).

that the rail carrier could (at its option) carry a shipment from point to point entirely by truck, or could carry the shipment by rail on one leg of its journey and by motor on another, by physically transferring the cargo from a railroad car to an over-the-road container, or vice versa. In Plan II TOFC/COFC service the transportation is provided by motor to points not reached by the carrier's tracks, using trucks owned by the rail carriers themselves. Plan II TOFC/COFC service is a continuous intermodal system that does not require a motor carrier certificate.[22]

In sum, both the rail and motor portions of the Plan II TOFC/COFC service are "transportation provided by a rail carrier" and are not "transportation provided by a motor carrier." The court below erred in assuming that the interstate rail carriers providing such service are also motor carriers,[23] and there-

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[22] The Commission's petition for a writ of certiorari (at 13) characterized the *Thomson* case as recognizing that a "railroad may use trucks as part of a 'single complete freight transportation service to and from all points on its lines' without becoming a motor common carrier * * *." The Court's ruling in *Thomson* was that the railroad involved in that case was entitled to a motor carrier certificate. The point that was intended to be made in the petition is that in *Thomson* the Court did not adopt a per se rule that a provider of transportation automatically becomes a motor carrier when motor transportation is provided, regardless of the circumstances, but that the Court found the railroad to be entitled to a motor carrier certificate only after examining the entire factual setting (Pet. Reply Br. 2-3 n.2). The United States regrets any misunderstanding caused by the phrasing of the petition.

[23] Indeed, near the end of its opinion, the panel ignored the facts of the case, characterizing the issue as involving "intrastate transportation by a *motor carrier* * * * done in con-

fore erred in relying on a jurisdictional limitation that is applicable only to motor carriers.

C. The Commission's Interpretation Of The Statutes At Issue Furthers The Staggers Act's Purposes Of Eliminating Disparate Federal And State Standards And Of Relieving Railroads Of Burdensome Regulation

In addition to analyzing the language of the statute, this Court also determines congressional intent by " 'look[ing] to the provisions of the whole law, and to its object and policy.' " *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (citation omitted). As a related matter, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (citing *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-543 (1940), and *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940)). In the present case, the structure and purposes of the Staggers Act reveal that the Commission has properly construed the pertinent statutory provisions. The court of appeals' interpretation, by contrast, would lead to incongruous results that could not have been intended by Congress.

Congress narrowly circumscribed state regulation of intrastate transportation provided by an interstate rail carrier because it concluded that burdensome state regulatory policies had prevented intrastate rail traffic from paying its fair share of the cost of the national railroad system. H.R. Rep. 96-1035, *supra*, at 61. Moreover, state regulatory stand-

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junction with a *measure* of intrastate rail transportation in the TOFC/COFC intermodal setting" (Pet. App. 7a (emphasis added)).

ards and procedures differed substantially from each other and from those promulgated by the Commission. *Id.* at 128-130. The legislative history of the Staggers Act reveals that Congress sought to ensure that the goals of the Act not be undermined by conflicting and burdensome state regulation. As the Conference report indicated (H.R. Conf. Rep. 96-1430, *supra*, at 106):

> The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the [Staggers] Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals.

See generally *Public Service Co. of Indiana, Inc.* v. *ICC*, 749 F.2d 753, 761 (D.C. Cir. 1984), cert. denied, No. 84-1699 (Oct. 15, 1985); *Indianapolis Power & Light Co.* v. *ICC*, 687 F.2d 1098, 1100 (7th Cir. 1982).

The legislative history of the Staggers Act exemption provision (49 U.S.C. 10505) reveals that at the time the Staggers Act was under consideration, Congress knew that the Commission was already proposing to exempt TOFC/COFC transportation pursuant to the limited exemption provisions of the earlier Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31 (see H.R. Rep. 96-1035, *supra*, at 60). In addition, 49 U.S.C. 10505(f) refers specifically to intermodal transportation as an appropriate area for exemption activity by the Commission.

The court of appeals in the present case premised its ruling largely on what it perceived was the "potential mischief" (Pet. App. 6a) of the Commission's position. The court posited a hypothetical fact situation (quoted on pages 17-18, *supra*) in which a "small

intrastate rail carrier" provides rail transportation of a loaded trailer for only a short distance and thereafter removes the trailer from the train, attaches it to a cab, and transports the trailer on the highway across virtually the entire State of Texas (Pet. App. 6a-7a). According to the court, under the Commission's position, the entire journey would "be completely free of regulation" (*id.* at 7a).[24] But there are two things wrong with this argument. First, the Commission has no jurisdiction over, and hence the Staggers Act (Section 11501) does not circumscribe a state's power to regulate, an *intrastate* railroad. See, *e.g.*, 49 U.S.C. 10501(a) and (b)(1), 11501(b)(1); *Magner-O'Hara Scenic R.R.* v. *ICC*, 692 F.2d 441 (6th Cir. 1982) (post-Staggers Act case holding intrastate scenic rail operation unconnected to the national rail system to be beyond Commission jurisdiction); cf. *Texas* v. *United States*, 730 F.2d at 357 (emphasis added) (indicating that the Staggers Act's pre-emptive scheme is addressed to "regulat[ion of] the intrastate rates of *interstate* railroads"). Second, the court's example posits a situation in which rail service is either incidental to motor carriage or a wholly unnecessary add-on; there is no reason to think either that this example is realistic or that the Commission could not recognize and deal with a subterfuge. The railroad petitioners involved in this case are sizable *interstate* rail carriers who perform bona fide TOFC/COFC service that includes carrying some shipments entirely within Texas (Pet. App. 16a, 24a n.1, 27a). The court's hypothetical example, therefore, simply has no bearing on this case.

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[24] There are various other places in which the court erroneously referred to the railroad petitioners as "intrastate rail carriers" (see Pet. App. 3a, 7a).

In fact, it is the court of appeals' decision that would lead to "mischief." By holding that the states retain jurisdiction over the motor portion of intrastate Plan II TOFC/COFC service provided by interstate rail carriers, the decision would frustrate the achievement, in one important area of rail service (Plan II TOFC/COFC), of the principal objectives of the Staggers Act—to reduce burdensome and unnecessary regulation and to eliminate disparate federal and state standards.

In enacting the Staggers Act, Congress explicitly sought to reduce the regulatory burden on railroads, thus enabling them to become more competitive. This objective is reflected in the congressional findings at the outset of the statute (49 U.S.C. 10101a note), in the statutory goals (*ibid.*), and in the National Rail Transportation Policy (49 U.S.C. 10101a(1) and (2)). Indeed, the legislative history of the Act reveals (H.R. Rep. 96-1035, *supra*, at 38) that the "inflexibility of existing regulation" was in Congress' view a "significant reason" for the poor financial condition of the railroads. Moreover, Congress was concerned not only about the federal regulatory burden but about regulation at the state level as well. As the House report notes (H.R. Rep. 96-1035, *supra*, at 128-130):

> In addition to the constraints imposed by Federal regulations, the rail industry is also faced with multiple and diverse regulations at the state level. * * * [The] fifty states have individual regulatory jurisdiction over railroads. * * * The scope of state regulation encompasses entry, operating authority, abandonment, rates, accounting, service safety, construction, security issues, mergers, acquisitions, insurance and re-

> porting. It should be noted that each of these areas is also regulated at the Federal level. * * * The constraints imposed by regulation have been considerable.

To deal with the problem of burdensome regulation, Congress gave the Commission broad exemption authority. 49 U.S.C. 10505; see H.R. Rep. 96-1035, *supra*, at 60. In so doing, Congress explicitly recognized that the Commission was already contemplating, pursuant to the 4R Act, exemption of TOFC/COFC service (*ibid.*) Referring to TOFC/COFC and to other exemption activity by the Commission, the House report indicated (*ibid.*):

> The [Interstate and Foreign Commerce] Committee has followed the Commission's exemptions closely and believes the Commission has proceeded on a sound basis given the existing statutory restrictions, easing unnecessary regulatory restraints and providing an improved competitive transportation environment.

See also *Brae Corp.* v. *United States*, 740 F.2d 1023, 1044 (D.C. Cir. 1984) (citing reference in House Report to TOFC exemption activity by the Commission), cert. denied, No. 84-550 (Apr. 29, 1985).[25]

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[25] Congress clearly had TOFC/COFC service in mind in enacting 49 U.S.C. 10505(f). That intent is clear from the explicit reference to TOFC/COFC in the legislative history of 49 U.S.C. 10505 (H.R. Rep. 96-1035, *supra*, at 60) and from the floor debate over subsection (f) in particular. See 126 Cong. Rec. 19397-19398 (1980) (remarks of Rep. Ertel). Representative Ertel characterized TOFC as "woefully underutilized" and as "the most familiar intermodal movement" (*id.* at 19397). He further indicated that "the regulatory structure has inhibited intermodal growth by isolating modes from one another" (*id.* at 19397-19398). We should note that

Furthermore, Congress explicitly granted the Commission authority to exempt "transportation that is provided by a rail carrier as a part of a continuous intermodal movement" (49 U.S.C. 10505(f)).[26]

The court of appeals' decision would undermine the exemption of Plan II TOFC/COFC service provided

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Representative Ertel made one reference to "exempt[ing] the rail portion of an intermodal freight movement" (*id.* at 19397). He was referring, however, to two-carrier intermodal arrangements involving railroads and "trucking companies, airlines, and barge companies wishing to cooperate with one another" (*id.* at 19398), rather than to Plan II TOFC/COFC service provided entirely by railroads.

It should also be underscored that the importance of intermodalism in general and TOFC in particular was emphasized repeatedly during the congressional hearings on the Staggers Act. See, *e.g.*, *Railroad Deregulation Act of 1979: Hearings on H.R. 4570 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 92, 140, 267, 275 (1979); *Railroad Transportation Policy Act of 1979: Hearings on S.1946 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 2d Sess. 418 (1980); *Rail Deregulation: Market Dominance, Contract Rates and Exemptions: Joint Hearing on H.R. 4570 Before the Subcomm. on Economic Growth and Stabilization of the Joint Economic Comm. and the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 93, 122 (1979).

[26] Congress' intentions in passing the Staggers Act would not, of course, operate to amend the existing provisions of the Motor Carrier Act unless Congress implemented those intentions with appropriate statutory language. But no amendment was needed here: there is no authority suggesting that the definition of "motor carrier" reached, or that Congress ever believed that it might reach, a railroad providing Plan II TOFC/COFC service.

by interstate rail carriers by leaving the motor portion of such service subject to state control with respect to any shipment that does not cross a state line, even if it is carried on a train that does. As a result, interstate railroads would remain subject to burdensome state regulation [27] with respect to one portion of some shipments carried by a type of service—TOFC/COFC service—that Congress contemplated exempting from regulation (see H.R. Rep. 96-1035, *supra*, at 60).

Contrary to congressional intent (see 49 U.S.C. 10101a(9); H.R. Rep. 96-1035, *supra*, at 128-130) the decision below would subject interstate rail carriers providing Plan II TOFC service to disparate federal and state regulation. As to shippers whose goods move interstate, the railroads will be entirely exempt from regulation; but the same railroads, when they provide the same Plan II service to shippers moving goods between points within a single state (even on the same interstate trains) will be subject to state regulation with respect to the motor portion of that service. Indeed, the reasoning of the panel's opinion would also seem to apply even if the rail portion of the Plan II TOFC service was *interstate*, as long as the motor portion was intrastate. The Commission, in a case raising the issue of whether certified states are bound by the Commission's exemptions, posed a hypothetical that—unlike the panel's hypothetical—is directly applicable here (*Ex Parte No. 388, State Intrastate Rail Rate Authority*—

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[27] See generally, U.S. Department of Transportation, *Intrastate Motor Carriage and Federal Policy Towards Small Communities* 23-60 (1981) (discussing rigid regulation of motor carrier licensing and rates in Texas).

Pub. L. 96-448, 367 I.C.C. 149, 153 (1983), aff'd, *Illinois Commerce Comm'n* v. *ICC*, *supra*) (footnote omitted):

> Because section 10505, and its underlying policy, is such a significant aspect of the Staggers Act, Congress could not have intended the practical problems and inconsistencies that would result from States retaining jurisdiction over classes of traffic exempted nationwide by the Commission. As an example, a trailer-on-flatcar (TOFC) shipment from Chicago to E. St. Louis, IL could be subject to intrastate regulation, while a TOFC shipment from Chicago to St. Louis, MO only a few miles further, is exempt from all regulation. This would cause unjustifiable operational and/or marketing difficulties for the railroads conducting business for the same class of traffic under both a regulated and unregulated environment. * * * [W]e conclude that Congress did not intend for the continued existence of State regulation that would produce this awkward result—namely, interference with the railroads' and shippers' freedom to take advantage of permitted flexibility in doing business under the Staggers Act.

As the District of Columbia Circuit recognized, in affirming the Commission's decision (*Illinois Commerce Comm'n*, 749 F.2d at 884), "Congressional findings supported the ICC's judgment that continued regulation by States could subvert a federal effort of deregulation through an exemption." [28]

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[28] Judge Scalia dissented in *Illinois Commerce* on the ground that "a Commission class-of-traffic exemption" is not "a 'standard or procedure' of the Commission" to which state regulation is required by Section 11501 to conform (see 749 F.2d at 889). We believe that *Illinois Commerce* was cor-

At no point in its decision did the court below attempt to explain how its ruling furthers any conceivable congressional objective. Indeed, it did not explain why the State of Texas has any interest in regulating trucking activity provided by railroads in the narrow context of Plan II TOFC service. Nor does the panel acknowledge that, as a result of its decision, the Commission's TOFC/COFC exemption will apply in two completely different ways, depending on whether the activity is interstate or intrastate. In short, the panel's opinion would all but nullify the Staggers Act in the area of intrastate Plan II TOFC/COFC activity.

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rectly decided. That question is not presented in this case, however, because unless the portion of service at issue is "transportation provided by a motor carrier" within the meaning of Section 10521, Texas is ousted of jurisdiction by the Commission's denial of certification, not here under review, without regard to the determination that Texas' attempt to regulate TOFC/COFC traffic was inconsistent with federal standards and procedures. We also note that any state that is certified to regulate intrastate rail transportation must, of course, comply with, inter alia, the statutory exemption standards set forth in 49 U.S.C. 10505, on which the Commission's Plan II TOFC/COFC exemption was based.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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